

JAN 18 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RUBEN MEDA-RODRIGUEZ,

Defendant - Appellant.

No. 05-50141

D.C. No. CR-04-01993-LAB

MEMORANDUM *

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted January 14, 2008**

Before: HALL, O'SCANNLAIN, and PAEZ, Circuit Judges.

Ruben Meda-Rodriguez appeals from his sentence of 63 months in prison and three years of supervised release following his conviction for being a deported alien found in the United States, in violation of 8 U.S.C. § 1326. We have

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Meda-Rodriguez contends that the district court erred by relying on an allegedly illegal deportation to increase his sentence pursuant to 8 U.S.C. § 1326(b). We disagree. *See United States v. Diaz-Luevano*, 494 F.3d 1159 (9th Cir. 2007) (per curiam); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495-98 (9th Cir. 2007) (en banc).

Meda-Rodriguez contends that the district court erred by making factual findings concerning the date of deportation in order to increase his sentence pursuant to 8 U.S.C. § 1326(b). We conclude that there was error, but that it was harmless. *See United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006).

Meda-Rodriguez contends that it was error for the district court to increase the statutory maximum for Meda-Rodriguez's sentence because the indictment did not allege that he was previously deported subsequent to his prior conviction. We conclude that there was error, but that it was harmless. *See United States v. Salazar-Lopez*, No. 06-50438, 2007 WL 3085906, at *2-6 (9th Cir. Oct. 27, 2007).

Meda-Rodriguez contends that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), effectively has been overruled. This contention is foreclosed. *See United States v. Covian-Sandoval*, 462 F.3d 1090, 1096-97 (9th Cir. 2006).

Alternatively, Meda-Rodriguez contends that *Almendarez-Torres* is limited to challenges to the indictment where the defendant admits the prior conviction and subsequent deportation during a guilty plea. This argument also is foreclosed. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091 (9th Cir. 2006).

Finally, Meda-Rodriguez contends that § 1326(b) is unconstitutional on its face because it permits the district court to increase the statutory maximum sentence based on facts found by the judge and neither admitted by the defendant nor found by the jury. This contention also is foreclosed. *See Beng-Salazar*, 452 F.3d at 1091.

AFFIRMED.